No. 91-1676

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1991

KENNETH S. KNIGIN,

*Petitioner,*

*vs.*

GUY J. MANGANO, Individually and as Presiding Justice of the Appellate Division of the State of New York, Second Judicial Department and GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT (NEW YORK),

*Respondents.*

*On Petition for a Writ of Certiorari to the New York Supreme Court, Appellate Division, Second Judicial Department*

## BRIEF IN OPPOSITION FOR RESPONDENT GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT

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No. 91-1676

In The

# Supreme Court of the United States

October Term, 1991

KENNETH S. KNIGIN,

*Petitioner,*

*vs.*

GUY J. MANGANO, Individually and as Presiding Justice of the Appellate Division of the State of New York Second Judicial Department and GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT (NEW YORK),

*Respondents.*

*On Petition for a Writ of Certiorari to the New York Supreme Court, Appellate Division, Second Judicial Department*

## BRIEF IN OPPOSITION FOR RESPONDENT GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT

### PRELIMINARY STATEMENT

This brief is submitted in opposition to the petitioner's

application for a writ of certiorari based upon the denial, by order dated October 15, 1991, of the New York Court of Appeals to grant leave to appeal, [*Matter of Knigin*, 78 N.Y. 2d 860 (1991)] and further based upon the denial by order dated January 14, 1992 of the New York Court of Appeals to grant reargument for leave to appeal, [*Matter of Knigin*, 79 N.Y. 2d 851 (1992)] from the order of the Appellate Division, Second Judicial Department of the Supreme Court of the State of New York, which on October 1, 1990 disbarred petitioner. *Matter of Knigin*, 162 A.D. 2d 82 (2nd Dept. 1990).

## STATEMENT OF JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under Title 28 U.S.C. § 1257(a).

## STATEMENT OF THE CASE

In this matter, petitioner was found guilty of four of the five charges of professional misconduct that had been lodged against him including conversion and failure to account for client funds that were entrusted to him to be held in escrow, issuing a check to a client for escrow funds from a non-escrow account with insufficient funds to cover the check, failing to maintain a duly constituted escrow account and commingling funds, failing to maintain and produce, pursuant to a *subpoena duces tecum,* a ledger book or similar record for his attorney escrow account, and failing to cooperate with respondent, Grievance Committee for the Ninth Judicial District of New York, in its investigation.

In disbarring petitioner, who was represented by counsel, after a full evidentiary hearing, the Appellate Division, Second Judicial Department of the Supreme Court of the State of New York which had the benefit of the entire record to review, sustained the Report of the Special Referee it had assigned to hear and report.

Thereafter, petitioner's motion to the Appellate Division, Second Judicial Department of the Supreme Court of the State of New York for leave to appeal to the Court of Appeals was denied by order dated June 26, 1991, his motion to the New York Court of Appeals to grant leave to appeal was denied by order dated October 15, 1991 and his motion to the Court of Appeals to grant reargument of his motion for leave to appeal was denied by order dated January 14, 1992.

## REASONS FOR DENYING THE WRIT

### I.

**Jurisdiction on writ of certiorari is not warranted in this matter.**

Rule 10 of the United States Supreme Court Rules is entitled "Considerations Governing Review on Writ of Certiorari" and Rule 10(.1) states:

> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has rendered a decision in conflict with the decisions of another United States court of appeals on the same matter, or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course

> of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

United States Supreme Court Rule 10.

Although Rule 10(.1) is not exhaustive, the facts of the instant matter do not even remotely relate to the "character of reasons" that this Court will consider for a petition for a writ of certiorari.

Furthermore, this Court has held,

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants.

*Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955).

The issues involved in the instant matter do not reach the constitutional dimensions to be addressed by the United States Supreme Court nor do they present an "intellectually interesting and solid problem." Instead, petitioner is raising questions of fact which the Appellate Division, Second Judicial Department of the Supreme Court of the State of New York in its jurisidiction, pursuant to its discretionary powers in attorney disciplinary matters in sustaining charges of professional misconduct, determined to warrant the sanction of disbarment. *New York State Judiciary Law, Section 90(2).*

## II.

**Petitioner has been afforded due process.**

The practice of law in the State of New York is a privilege, not a right. *Matter of Dondi*, 63 N.Y. 2d 331 (1984); *Matter of Capoccia*, 59 N.Y. 2d 549 (1983). An attorney who is the subject of a disciplinary proceeding which could potentially lead to his disbarment is entitled to procedural due process, including a fair notice of the charges and an opportunity to be heard. *In re Ruffalo*, 390 U.S. 544 (1968). It is well-settled that New York's statutory scheme concerning attorney disciplinary matters fully comports with federal constitutional guarantees of procedural due process. *Mildner v. Gulotta*, 405 F. Supp. 182 (E.D.N.Y. 1975), *aff'd*, 425 U.S. 901 (1975).

Further, disciplinary proceedings,

> are not for the purpose of punishment, but rather seek to determine the fitness of an officer of the court to continue in that capacity and to protect

> the courts and the public from the official ministration of persons unfit to practice.

*In re Echeles*, 430 F.2d 347, 349 (7th Cir. 1970).

In the case at bar, petitioner had fair notice of the charges. He was served with a petition containing five separate alleged charges of professional misconduct. The issues raised by the petition and answer were then referred by the Appellate Division, Second Judicial Department to a Special Referee "to hear and to report, together with his findings upon each of the issues."

Thereafter, petitioner, who was represented by counsel, was afforded a full evidentiary hearing and had the opportunity to produce witnesses and introduce documents into evidence on his own behalf. After the Referee rendered his Report, both sides submitted motions to the Appellate Division, Second Judicial Department which within its authority determined whether or not the charges had been sustained. *In re Broome*, 13 A.D. 2d 657 (2nd Dept. 1961), *rev'd on other grounds*, 10 N.Y. 2d 942 (1961). Thus, petitioner received his federal constitutional guarantees of procedural due process, *Mildner v. Gulotta, supra*, and the mechanism utilized by the Appellate Division, Second Judicial Department did not abrogate petitioner's federally-protected rights. *Erdmann v. Stevens*, 458 F.2d 1205 (2nd Cir. 1972).

Petitioner's contention that the order of the Appellate Division, Second Judicial Department and the Report of the Special Referee contain inconsistent findings and conclusions is simply erroneous. The determination of whether petitioner was guilty of the charges is a question of fact (which is beyond the purview of this Court) and is not a question of law of constitutional proportions.

The October 1, 1990 order of the Appellate Division, Second

Judicial Department states, "After reviewing all of the evidence, we are in full agreement with the report of the Special Referee." (*see* petitioner's Exhibit II, A-31). This "full agreement" pertains to the findings that respondent had met its burden of proof by a fair preponderance of the credible evidence, *Matter of Capoccia, supra*, as to Charges One, Two, Four and Five of the petition which had been served on petitioner (*see* Resp. App. 1a). The "full agreement" does not refer to the mitigating factors set forth in the Referee's Report as petitioner maintains.

The issues raised by the petition and answer were referred to the Special Referee solely "to hear and to report" and the Referee is *not* empowered to determine or impose a sanction. *Matter of 3260 Perry Ave. Realty Corp.*, 285 A.D. 71 (1st Dept. 1954). The Appellate Division, Second Judicial Department, pursuant to its discretionary powers, is authorized to impose sanctions in attorney disciplinary matters. *New York State Judiciary Law, Section 90(2)*. As such, the Appellate Division, even after considering the mitigating factors set forth in the Report of the Special Referee, may impose the sanction of disbarment if the Court determines that such discipline is warranted based on the facts of the matter. The order may be rendered with or without explanation. *Mildner v. Gulotta, supra.*

## III.

**The sanction of disbarment is a matter of discretion and wholly justified by the facts of this matter.**

The Appellate Division, Second Judicial Department of the Supreme Court of the State of New York has consistently deemed appropriate the sanction of disbarment when an attorney has converted escrow funds entrusted to him, failed to maintain a duly constituted escrow account, failed to maintain a ledger book or similar record and failed to honor a judicial *subpoena duces*

*tecum*. *See, e.g., Matter of Wiacek*, 150 A.D. 2d 4 (2nd Dept. 1989); *Matter of Thomas*, 150 A.D. 2d 123 (2nd Dept. 1989).

Furthermore, the sanction of disbarment has been imposed on attorneys where there has been a finding of conversion of escrow funds even when the Appellate Division, Second Judicial Department has taken mitigating factors placed on the record into consideration. *See, e.g., Matter of D'Alvia*, 168 A.D. 2d 71 (2nd Dept. 1991); *Matter of Dolan*, 168 A.D. 2d 1 (2nd Dept. 1991); *Matter of Tahlor*, 164 A.D. 2d 510 (2nd Dept. 1991); *Matter of Schwartz*, 131 A.D. 2d 276 (2nd Dept. 1987).

In the instant matter, petitioner was found guilty of conversion and failure to account for funds that were entrusted to him to be held in escrow, issuing a check to a client from a non-escrow account for escrow purposes with insufficient funds to cover the check, failing to maintain a duly constituted escrow account and commingling funds, failing to maintain and produce, pursuant to a judicial *subpoena duces tecum*, a ledger book or similar record for his attorney escrow account and failing to cooperate with respondent in its investigation.

The State of New Jersey has a per se disbarment rule where an attorney misappropriates funds. *Matter of Wilson*, 81 N.J. 451 (1979). This view has been expressed in New York too. *See, e.g., Matter of Pressment*, 118 A.D. 2d 270 (1st Dept. 1986); *Matter of Marks*, 72 A.D. 2d 399 (1st Dept. 1980).

The sanction of disbarment imposed on petitioner was neither cruel, unusual or excessive based upon the facts of this matter.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GARY L. CASELLA
*Attorney for Respondent*
*Grievance Committee for the*
*Ninth Judicial District*

GARY D. EGERMAN
*Of Counsel*

## APPENDIX A — NOTICE OF PETITION AND PETITION OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT DATED MARCH 17, 1988

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

In the Matter of KENNETH S. KNIGIN, an Attorney and Counselor-at-Law:

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Petitioner,

-against-

KENNETH S. KNIGIN,

Respondent.

NOTICE OF PETITION

SIRS:

PLEASE TAKE NOTICE that upon the annexed petition of Kingdon P. Locker, Chairman of the Grievance Committee for the Ninth Judicial District, verified on the 17th day of March, 1988, a motion will be made before this Court at the courthouse, 45 Monroe Place, in the Borough of Brooklyn, County of Kings, City and State of New York, on the 22nd day of April, 1988 at nine-thirty o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order directing that the respondent, KENNETH S. KNIGIN, as an attorney and counselor-at-law, be

disciplined upon the charges set forth in the annexed petition and for such other or further action upon the charges embodied in the annexed petition, as justice may require, and for such other and further relief as may be just and proper. Respondent shall serve and file two copies of his answer with proof of service on or before the return date.

DATED: White Plains, New York
March 17, 1988

Yours, etc.

GARY L. CASELLA
Attorney for Petitioner

GARY D. EGERMAN
Of Counsel

Office & P.O. Address
200 Bloomingdale Road
White Plains, NY 10605

TO: Kenneth S. Knigin
Respondent
33 West Patent Road
Bedford Hills, NY 10507

*Appendix A*

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

In the Matter of KENNTH S. KNIGIN, an Attorney and Counselor-at-Law:

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Petitioner,

-against-

KENNETH S. KNIGIN,

Respondent.

PETITION

TO THE HONORABLE, THE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT

The petition of the Grievance Committee for the Ninth Judicial District respectfully alleges that:

FIRST: By order of this Court, dated and filed February 29, 1988, the Grievance Committee for the Ninth Judicial District was authorized to institute and prosecute a disciplinary proceeding in this Court against Kenneth S. Knigin based on the acts of professional misconduct as set forth in the Confidential Report of the Grievance Committee for the Ninth Judicial District filed

with the Court. Further, said order appointed Gary L. Casella as attorney for the petitioner in this proceeding.

SECOND: Said order of February 29, 1988 was duly made and filed by this Court pursuant to the authorization of § 90 of the Judiciary Law and pursuant to § 691.4 of the Rules Governing the Conduct of Attorneys of this Court.

THIRD: The respondent, Kenneth S. Knigin, was admitted to practice as an attorney and counselor-at-law in the courts of the State of New York by the Appellate Division of the State Supreme Court, Second Judicial Department, on April 6, 1955 under the name Kenneth Sheldon Knigin.

FOURTH: Upon information and belief at all times hereinafter mentioned, respondent engaged in the practice of law in the State of New York and maintained offices for said purpose in Westchester County, New York.

FIFTH: Upon information and belief, respondent, Kenneth S. Knigin, has been guilty of illegal, corrupt and unethical practices and of professional misconduct and conduct prejudicial to the administration of justice as an attorney and counselor-at-law in that:

CHARGE ONE

Respondent, Kenneth S. Knigin, has been guilty of conduct involving dishonesty, fraud, deceit or misrepresentation by converting and/or failing to account for funds that were entrusted to him to be held in escrow, as follows:

(1) Harvey Meyer retained respondent in or about

1985 to represent him in the sale of his cooperative apartment.

(2) Respondent prepared the contract of sale and the downpayment in the amount of $17,900.00 was deposited into respondent's money market account, #2111234524101, entitled "Kenneth S. Knigin," maintained at State Bank of India on or about February 21, 1985.

(3) The closing occurred on April 25, 1985. Respondent, despite demands from Meyer, did not release the downpayment which he was holding in escrow at that time.

(4) The bank records of respondent's money market account #2111234524101, maintained at the State Bank of India reflect that as of February 22, 1985 the balance in the account had fallen to $3,905.00. The balance as of March 4, 1985 was $123.00 and the closing balance as of April 5, 1985 was $84.00 as a result of respondent having converted escrow funds entrusted to him. During this entire period, respondent was required to hold $17,900.00 in escrow.

CHARGE TWO

Respondent has been guilty of engaging in conduct involving dishonesty, fraud, deceit or misrepresentation and that adversely reflects on his fitness to practice law as follows:

(1) Charge One is repeated, reiterated and realleged as if more fully set forth herein.

*Appendix A*

(2) In or about August, 1985 respondent forwarded to Meyer a check in the amount of $16,660.28 which represented an "adjusted reimbursement of the escrow account."

(3) The check was written against an account maintained by respondent at Sterling National Bank and Trust Company, account #035-52804-07, which account is entitled "Kenneth S. Knigin." In testimony before petitioner on May 5, 1987 respondent stated under oath that said account was a business checking account and not an escrow, trust or special account.

(4) When Meyer presented the check for payment, it was returned as uncollectible because of insufficient funds.

(5) In or about December 1985, respondent allegedly admitted his wrongful conduct and paid Meyer the sum of $20,000.00 which amount represented the downpayment of $17,900.00 plus interest due Meyer from the time of the April 1985 closing.

CHARGE THREE

Respondent has been guilty of engaging in conduct that adversely reflects on his fitness to practice law by failing to maintain a duly constituted escrow account and of commingling funds as follows:

*Appendix A*

(1) Charges One and Two are repeated, reiterated and realleged as if more fully set forth herein.

(2) Respondent maintained an escrow account, #02870544, entitled "Kenneth S. Knigin, Special," at Citibank for the period April 1980 to July 1981 in which account respondent commingled clients' and personal funds and caused check to be issued for both escrow and personal obligations.

CHARGE FOUR

Respondent, Kenneth S. Knigin, has been guilty of engaging in conduct that adversely reflects on his fitness to practice law, by failing to maintain and produce, pursuant to subpoena, a ledger book or similar record and records of all deposits and withdrawals for his attorney escrow account, as follows:

(1) Charges One, Two and Three are repeated, reiterated and realleged as if more fully set forth herein.

(2) The Rules Governing the Conduct of Attorneys of the Appellate Division, Second Judicial Department § 691.12(b), (e) and (f) (22 NYCRR § 691) require an attorney, *inter alia,* to maintain a ledger book or similar record for all special accounts as well as the records of all deposits and withdrawals from such accounts for a period of seven years after the events which they record and to produce those records in response to a subpoena duces tecum.

*Appendix A*

(3) Failure to maintain and/or produce the aforesaid records as set forth above, subjects the attorney to disciplinary proceedings.

(4) Respondent has failed to comply with § 691.12(b), (e) and (f) of the Rules Governing the Conduct of attorneys of the Appellate division, Second Judicial Department. [22 NYCRR § 691(b)(e)(f)].

CHARGE FIVE

Respondent has been guilty of engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, that is prejudicial to the administration of justice and that adversely reflects on his fitness to practice law, by failing to honor a judicial subpoena duces tecum duly served upon him and by failing to cooperate with a legitimate inquiry of the petitioner, Grievance Committee for the Ninth Judicial District, as follows:

(1) Charges One, Two, Three and Four are repeated, reiterated and realleged as if more fully set forth herein.

(2) On or about April 22, 1987 respondent was personally served with a judicial subpoena so ordered by the Appellate Division, Second Department, requiring him to appear at the offices of petitioner on April 23, 1987 to give testimony under oath.

(3) On or about April 22, 1987 respondent was also personally served with a judicial subpoena

duces tecum so ordered by the Appellate Division, Second Department requiring him to produce at the office of petitioner on April 23, 1987,

> Any and all papers, documents and records in your possession or control relating to your representation of Harry (Harris) Meyer; Any and all bank records including, but not limited to, statements, deposit slips, cancelled checks and check register in your possession or control regarding any and all escrow accounts maintained for the period 1/1/85 to date, including, but not limited to, accounts at Chemical Bank, Citibank, Sterling National Bank and the Bank of India; Any and all bank records including but not limited to, statements, deposit slips, cancelled checks and check register in your possession or control regarding account #0260077730355280407 entitled "Kenneth S. Knigin" maintained at the Sterling National Bank, 540 Madison Avenue, New York, New York, for the period 1/1/85 to date; and your ledger books or "similar records" for any and all of your escrow accounts maintained for the period 1/1/85 to date.

(4) Respondent, although appearing before petitioner to give testimony under oath on May 5, 1987, failed to produce any of the documents and records pursuant to the aforesaid judicial subpoena duces tecum.

(5) At no time since, has respondent produced any of the documents subpoenaed.

SIXTH: Respondent, Kenneth S. Knigin, knew or should have known in committing the aforesaid acts, that he was violating the applicable statutes of the State of New York; the Code of Professional Responsibility of the New York State Bar Association effective January 1, 1970, as amended, including Disciplinary Rules 1-102(A), (4), (5) and (6), 9-102(A) and (B), and § 691.12(a), (b), (e) and (f) of the Rules Governing the Conduct of Attorneys of the Appellate Division, Second Judicial Department. [22 NYCRR § 691.12]

SEVENTH: The source of petitioner's knowledge and the grounds for its belief are the facts in evidence as set forth in the report of the Grievance Committee for the Ninth Judicial District filed with the Appellate Division, Second Department.

WHEREFORE, petitioner prays that an order directing that respondent, Kenneth S. Knigin, an attorney and counselor-at-law be disciplined upon the charges as set forth herein and for such other action as may be contemplated by § 90 of the Judiciary Law of the State of New York.

s/ Kingdon P. Locker
KINGDON P. LOCKER

DATED: White Plains, New York
March 17, 1988